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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY LUCERO,

Defendant and Appellant.

C081035

(Super. Ct. No. 15F01351)

In this case, a magistrate denied defendant Anthony Lucero's motion to suppress evidence, concluding that defendant's encounter with police was consensual. We agree and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewing the evidence in the light most favorable to the magistrate's ruling, the following facts appear: On February 27, 2015, Sacramento Police Officer Jeffrey Shirashi was on duty about 1:30 a.m. when he noticed a silver Nissan Altima eastbound on Fruitridge Road approaching 88th Street. The car caught Officer Shirashi's attention

because it was the only vehicle on the road in an area the officer knew as having “a lot of commercial burglaries, residential burglaries, and other crimes.” The Altima turned right onto 88th Street, and Officer Shirashi followed as the car then turned left on 37th Avenue, then left on Alder Avenue back toward Fruitridge. Officer Shirashi conducted a records check and determined the car was a rental. At Fruitridge, the car turned right and continued eastbound toward South Watt Avenue. After waiting at a red light, the Altima made a U-turn, then entered a gas station located at the northwest corner of Fruitridge and South Watt.

At the gas station, the Altima made a sweeping right turn and parked next to a gas pump facing west. Officer Shirashi waited at the entrance of the station until the Altima had stopped, then pulled up and stopped his patrol car at an angle facing the front right quarter panel of the Altima, about 10 feet away. He did not activate the lights on his patrol car. The passenger in the Altima, Muey Saechao, got out of the car and started walking toward the convenience store portion of the gas station. Officer Shirashi got out of his patrol car and initiated a conversation with Saechao loud enough so that the driver of the Altima (defendant) could hear him. He asked how they were doing and “expressed some concern for the direction of travel that they had taken.” He said something to the effect that the path they had traveled was “a bit suspicious” to him, explaining that there had been increases in burglaries of warehouses and other commercial buildings in the area. He began to ask where they lived and received conflicting information, so eventually he asked for identification, which they provided. He asked Saechao to “sit back into the [Altima],”¹ then took their identification back to his patrol car and ran a records check, which revealed that defendant was a parolee-at-large and had an

¹ Even Saechao, who claimed Officer Shirashi had her get back in the car *before* he asked for their identification, testified that the officer *asked* her, rather than ordered her, to return to the car.

outstanding arrest warrant for narcotics. A subsequent search of the Altima revealed a bullet in the pocket of some basketball shorts in a suitcase in the trunk and a disassembled pistol loaded with similar bullets under the center console.

Defendant was charged with being a felon in possession of a firearm and the prohibited possession of ammunition. He moved to suppress the evidence against him. In opposing the motion, the prosecutor argued that the encounter between defendant and Officer Shirashi was consensual, rather than a detention, and the search of the Altima was justified because defendant was on searchable parole.

The magistrate agreed the encounter was consensual, even though “most folks” might have felt they had no choice but to remain once a patrol car has pulled up. After the magistrate denied defendant’s motion to suppress and held him to answer, defendant renewed his suppression motion before the trial court based on the preliminary hearing transcript. He asserted he was detained once Officer Shirashi “ordered” Saechao back into the Altima and/or once he gave his identification to the officer. The trial court denied the renewed motion. Thereafter, defendant pled guilty to both charges and admitted a prior strike conviction, and the trial court sentenced him to an aggregate prison term of 32 months (the 16-month low term for the felon in possession charge doubled for the prior strike).

DISCUSSION

On appeal, defendant contends we “should determine that the magistrate’s conclusion that reasonable people would not have felt free to leave was correct, making the encounter a detention rather than consensual.”² Unlike defendant, however, we do

² Where, as here, a defendant unsuccessfully moves to suppress evidence before the magistrate, then unsuccessfully renews that motion before the trial court, we “review[] the determination of the magistrate who ruled on the motion to suppress.” (*People v. Ramsey* (1988) 203 Cal.App.3d 671, 679.)

not construe the magistrate's comments about what "most folks" might think when a patrol car pulls up as a *finding* that a reasonable person would not have felt free to leave under the circumstances of this case. Indeed, the magistrate made these comments in the very midst of concluding the encounter was consensual and it is *that* conclusion we must review.

As to that point, defendant's argument that the encounter was a detention because a reasonable person would not have felt free to leave is based on a false premise, or at least an incomplete one: An encounter with a law enforcement officer is *not* a detention *just* because a reasonable person would not feel free to leave. That is, application of the Fourth Amendment does not turn *solely* on how a reasonable person would feel. Instead, for there to be a detention where there has been no exercise of physical force by the police, there must have been a show of authority. (*People v. Brown* (2015) 61 Cal.4th 968, 974.) "A detention occurs when an officer intentionally applies physical restraint or initiates a show of authority to which an objectively reasonable person innocent of wrongdoing would feel compelled to submit, and to which such a person in fact submits. [Citations.] 'In situations involving a show of authority, a person is seized "if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,' " or " 'otherwise terminate the encounter' " [citation], and if the person actually submits to the show of authority [citation].' " [Citation.] The test for the existence of a show of authority is an objective one and thus, '[n]either the officer's uncommunicated state of mind nor the subjective belief of the individual citizen is relevant to the determination of whether a police contact is a detention.' " (*People v. Linn* (2015) 241 Cal.App.4th 46, 57-58.)

Thus, the initial question here is not whether a reasonable person in defendant's position would have felt free to leave, but whether Officer Shirashi engaged in a show of authority that would have caused a reasonable person to feel that way. Unfortunately, defendant largely ignores that question, instead focusing just on whether a reasonable

person would have felt free to leave. In arguing *that* issue, he points to: (1) the proximity and position of Officer Shirashi's patrol car with respect to the car he was in; (2) the nature of Officer Shirashi's statements to Saechao after the officer got out of his car; (3) Officer Shirashi's "order" that Saechao return to the car with defendant; and (4) Officer Shirashi's "order" that Saechao and Lucero produce their identifications.

Considering the foregoing factors with respect to the question of whether Officer Shirashi engaged in a show of authority, we conclude that he did not, and therefore the encounter between the officer and defendant was not a detention. Most importantly, Officer Shirashi did not *order* Saechao to return to the car, and he did not *order* Saechao and defendant to produce their identification. Instead, he *asked* for both of these things. The facts we have set forth above, in the light most favorable to the magistrate's ruling, do not show any coercive exercise of authority by Officer Shirashi. Even considered in their totality, the circumstances here--the position of the patrol car, Officer Shirashi's statements after getting out of the car, his request for their identification, and his request that Saechao return to the car--did not constitute a show of authority and therefore did not result in the detention of defendant. Officer Shirashi initiated a consensual encounter with defendant and Saechao, and during the course of that encounter defendant voluntarily gave his identification to the officer, from which the officer determined he was on searchable parole. Because defendant was not detained at any time before Officer Shirashi acquired a lawful basis to search the Altima, the magistrate correctly denied defendant's suppression motion.

DISPOSITION

The judgment is affirmed.

/s/
Robie, J.

We concur:

Raye, P. J.

/s/
Blease, J.